Mark Scheme (Post Standardisation)

January 2022

BTEC Level 3 Nationals in Applied Law

Unit 1: Dispute Solving in Civil Law

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Unit 1: Dispute Solving in Civil Law

General marking guidance

- All learners must receive the same treatment. Examiners must mark the first learner in exactly the same way as they mark the last.
- Mark grids should be applied positively. Learners must be rewarded for what they have shown they can do rather than be penalised for omissions.
- Examiners should mark according to the mark grid, not according to their perception of where the grade boundaries may lie.
- All marks on the mark grid should be used appropriately.
- All the marks on the mark grid are designed to be awarded. Examiners should always award full marks if deserved. Examiners should also be prepared to award zero marks, if the learner's response is not rewardable according to the mark grid.
- Where judgement is required, a mark grid will provide the principles by which marks will be awarded.
- When examiners are in doubt regarding the application of the mark grid to a learner's response, a senior examiner should be consulted.

Specific marking guidance

The mark grids have been designed to assess learners' work holistically.

Rows in the grids identify the assessment focus/outcome being targeted. When using a mark grid, the 'best fit' approach should be used.

- Examiners should first make a holistic judgement on which band most closely matches the learner's response and place it within that band. Learners will be placed in the band that best describes their answer.
- The mark awarded within the band will be decided based on the quality of the answer in response to the assessment focus/outcome and will be modified according to how securely all bullet points are displayed at that band.
- Marks will be awarded towards the top or bottom of that band depending on how they have evidenced each of the descriptor bullet points.

Mark GRID Applied Law Unit 1: Dispute Solving in Civil Law - marks 30 (x2)
Total Marks for external Task are 60

sessment focus	Band 0	Band 1	Band 2	Band 3	Band 4	Band 5
To be used with both Activity 1 and Activity 2						
Selection, knowledge and understanding of relevant legal rules and principles. Citation of appropriate statutes, precedent and other legal authorities.	0	1-2	3-4	5-6	7-8	9-10
	No rewardable material.	•Selection of very limited or anecdotal legal principles. •Very limited detail and/or development of the relevant law •Very limited or no use of precedents, statutes or other legal authorities.	•Selection of a limited range of basic legal principles. •Limited detail and/or development of the relevant law. •Limited use of precedents, statutes or other legal authorities.	•Selection of an adequate range of legal principles. •Some detail and some development of the relevant law. •Adequate use of precedents, statutes or other legal authorities.	•Selection of a wide range of legal principles. •Good detail and development of the relevant law. •Good use of precedents, statutes or other legal authorities.	•Selection of a comprehensive range of legal principles. •Thorough detail and development of the relevant law. •Very good use of precedents, statutes or other legal authorities.

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Total Marks for external Task are 60

sessment focus	Band 0	Band 1	Band 2	Band 3	Band 4	Band 5
To be used with both Activity 1 and Activity 2						
Application of legal principles to the facts provided. Analysis of legal arguments relevant to the given scenario. Evaluation of legal principles and arguments to provide critical commentary and reach **justified conclusions.**	0 o rewardable material.	1-4 •Demonstrates very limited application of the law relevant to the scenario. •Analysis lacks a grasp of the concepts and legal arguments in the context of the scenario. •Evaluation fails to provide alternatives or conclusions or does so in a very limited or anecdotal manner.	5-7 •Demonstrates limited application of the law relevant to the scenario. •Analysis shows limited grasp of the concepts and legal arguments in the context of the scenario. •Evaluation shows limited consideration of alternatives and/or conclusions.	8-10 •Demonstrates adequate application of the law relevant to the scenario. •Analysis shows some grasp of the concepts and legal arguments in the context of the scenario. •Evaluation shows adequate consideration of alternatives and/or conclusions.	11-13 •Demonstrates a good application of the law relevant to the scenario. •Analysis shows a good grasp of the concepts and legal arguments in the context of the scenario. •Evaluation shows good consideration of alternatives and/or conclusions.	14-16 •Demonstrates thorough application of the law relevant to the scenario. •Analysis shows detailed and reasoned grasp of the concepts and legal arguments in the context of the scenario. •Evaluation shows thorough consideration of alternatives and/or justified conclusions.

Mark GRID Applied Law Unit 1: Dispute Solving in Civil Law - marks 30 (x2)
Total Marks for external Task are 60

sessment focus	Band 0	Band 1	Band 2	Band 3	Band 4
To be used with both Activity 1 and Activity 2					
Presentation and structure	0	1	2	3	4
	No rewardable material.	• Lacks professional format and structure, leading to lack of clarity. • Language is inappropriate for audience.	• Has a basic professional format and structure with some clarity. • Language is sometimes appropriate for audience.	• Has a logical structure and format that is generally clear and professional. • Language is mostly appropriate for audience.	• Is well written, uses clear language, has a logical and professional format and structure. • Language is appropriate for audience throughout.

Activity 1 - Indicative Content

Demonstrate an understanding of the legal principles relating to negligence:

- duty of care
- breach of that duty, and
- causation of foreseeable damage

Recognise relevant legal authorities:

Duty of care: principles set out in *Robinson v Chief Constable of West Yorkshire Police*:

- Apply any relevant existing precedent, statutory provision or duty situation
- In novel cases, use the incremental approach and established principles

Breach: The objective 'reasonable man' test: *Blyth v Birmingham Waterworks Company*

- Standard as applied to:
  - Professionals: *Wells v Cooper*
- Risk factors:
  - Characteristics of C or gravity of risk: *Paris v Stepney*
  - Seriousness of risk: *Bolton v Stone*
  - Cost of precautions: *Latimer v AEC*
  - Social utility: *Watt v Hertfordshire Council*

Damage:

- Factual causation: *Barnett v Chelsea and Kensington Hospital Management Committee*
- Remoteness of damage: *The Wagon Mound*
- Recognise the special relevance of remoteness of damage in relevant cases:
  - *Hughes v Lord Advocate, Tremain v Pike, Jolley v London Borough of Sutton, Vacwell Engineering Co Ltd v BDH Chemicals Ltd, Margereson v JW Roberts Ltd, Bradford v Robinson Rentals, The Wagon Mound, Corr v IBC, Roe v Minister of Health (risk **not** foreseeable)*

Apply the law to Solar Bodyz and Adam

Adam is likely to be owed a duty of care by Solar Bodyz

- Where the case has a similarity to an **existing precedent**, it should, under the rule in *Robinson,* be applied. The most likely authority is the similar case provided in Source A - *Hughes v Lord Advocate:*
  - Facts: Both cases involved: claimants who were burned in unusual circumstances, an overt risk of harm from equipment if misused/accidentally misused (paraffin lamps/sunbed), a lack of easy precautions that could have been taken, a lack of sufficient warnings, an unforeseeable (chemical/explosive) reaction leading to the burns, defendants providing a service to the public, known sources of danger, workmen/salon who, had they done what they failed to do, could have avoided the harmful outcome, claimants in a recognized legal relationship (i.e. neither of the claimants were trespassers)
  - Law: the ratio of the source case is on the foresight of harm point but there are several references in the case to a duty of care being held in similar cases and if a duty were held in Hughes then a duty would be held in similar circumstances under the rules of precedent
- Where the case fits within an established/existing **duty situation**:
  - Creditworthy examples from learners' responses included: owner of premises to customer, shops to customers, company to purchaser of services, business to consumer, service provider to client, owner/occupier or person in control of premises to visitor, merchant to consumer, company to paying customer, a duty to the general public, a contractual obligation and a number of learners made direct comparisons to the broad situation in Donoghue v Stevenson – although the scenario wasn't strictly a 'product liability' situation, the general sense of a consumer duty was credited
- There is no novelty but a candidate who claimed there was and made a reasoned and justified use of the incremental approach would be credited

Solar Bodyz is likely to have breached the duty owed

- Based on the general breach principle from *Blyth*:
  - Solar Bodyz has fallen below the standard of the reasonable 'man' or tanning salon
- Based on the standard of the professional/skilled defendant from *Wells v Cooper:*
  - Solar Bodyz has fallen below the standard of the reasonable professional/commercial tanning salon 'skilled in that art' by not warning clients of a potential risk regardless of how unlikely or remote it might be
- Relevant risk factors to take into account
  - Characteristics of C – nothing about Adam makes him especially vulnerable. Indeed, as a regular customer, he might be viewed as having some familiarity with the operation of a tanning salon
  - Seriousness of risk – a tanning machine has the potential to cause high levels of harm if misused or faulty. The risk was low but not unknown and the potential danger was high. This higher level of risk raises the standard of care owed by Solar Bodyz in Adam's favour
  - Cost of precautions – it would cost little financially, or in terms of inconvenience, to warn customers of the broadest range of risks even if they are remote. This is especially the case when weighed against the level of risk and the degree of potential harm. It is accepted that they took some precautions (time limits, signs and warnings) but the cost or inconvenience of giving a slightly broader warning of something that was not an unknown risk would be weighed against the potential harm which is considerable. This risk factor is likely to raise the standard of care and be interpreted in Adam's favour and against Solar Bodyz
  - Utility – no arguable social utility
  - Conclude any variation in the standard of care will operate against Solar Bodyz
- Overall breach conclusion – Solar Bodyz has clearly breached their duty of care

Solar Bodyz has caused foreseeable harm

- Solar Bodyz has caused personal injury to Adam (the 'severe burns all over his body') which, 'but for' their omission (not telling Adam/other clients of the risk), he would not have sustained. Therefore, Solar Bodyz is the factual cause of Adam's injuries
- **Use the source**:
  - Adam's injury is not too remote from Solar Bodyz' breach as it is reasonably foreseeable under the principle laid out in *Hughes v Lord Advocate*: "The defendant was liable, as the type of harm was foreseeable even if the exact way in which it occurred was not. The explosion was not foreseeable but burning was foreseeable."

Likely outcome for Solar Bodyz

- Solar Bodyz is likely to be liable to Adam in negligence:
  - They owed him a duty of care based on existing precedent or a recognized duty situation
  - They breached that duty by falling below the standard of the reasonable (professional/commercial) tanning salon based on *Wells*
  - They caused reasonably foreseeable harm based on a straightforward application of the 'but for' test and, it is submitted, the relevant remoteness test *Hughes*

Credit any other alternative lines of reasoning

- Alternative outcomes where properly supported

Activity 2- Indicative Content

Demonstrate understanding of the law relating to damages

- General damages compensate for the direct physical and/or psychological effects of the negligence where C's injuries can be clearly linked to D's act/omission. Examples: primary injuries, pain & suffering, loss of amenity and loss of future earnings
- Special damages compensate for all the expenses C incurred as a direct result of D's negligence. It takes into consideration future costs of medical care and future loss of income that is directly tied to c'S injuries. Examples: pre-trial expenses (loss or damage to property or medical expenses), expenses incurred by others, pre-trial loss of earnings and travel expenses
- Pecuniary losses – pre-trial and future losses that can be calculated in money terms as C will provide evidence of actual expenditure and other evidence to justify future earnings
- Non-pecuniary losses – although the losses are not financial, the court can only compensate in a financial way so it attempts to quantify things like the primary injury, pain and suffering and loss of amenity
- Lump sums and structured settlements

Demonstrate understanding of the law relating to access to justice and the civil justice system

Sources of advice

- Lawyers
- Citizens Advice Bureau
- Trades unions
- Free Representation Units
- Lawyers' *pro bono* schemes
- Online advice sources
- Insurance policies

Sources of Funding

- Conditional Fee Arrangements
- Claimant's own resources
- Lawyers' *pro bono* schemes
- Insurance policies

Alternatives to the Civil Courts

- Negotiation
- Mediation
- Conciliation
- Arbitration

The Civil Courts

- Courts of first instance:
    - The Queen's Bench Division of the High Court >£100,000 or >£50,000 for PI
    - The County Court <£100,000 or <£50,000 for PI (including Small Claims<£10,000 or £1,000 for PI)

The three-track system

- Small Claims (<£10,000 or <£1,000 PI) - informal, DIY, inquisitorial, no lawyers or legal aid
- Fast Track (£10,000 - £25,000) - fast allocation and hearing (30 weeks), one-day trial, strict court-enforced timetables
- Multi Track (>£25,000) - encourages ADR, active case management, strict timetables, limited costs, case conferences

Apply the law to Adam

Damages

- Adam can claim for his **general** damages for:
  - his primary injuries (burns) - learners may have researched burns which, for visible scars, are typically in the £6,000 to £18,000 range (not exact so credit any reasonable assertion of this cost)
  - mental pain and anguish – Adam is suffering from depression and low self-esteem so this is relevant - unspecified
  - loss of amenity – unspecified but there are career implications to be determined
- Adam can claim for his **special** damages for:
  - his loss of pre-trial income that is directly tied to injuries – losses based on £100,000 per six months
  - short-term and long-term medical expenses – unspecified but relevant
  - transportation costs – unspecified but relevant
  - repair or replacement of damaged property – unspecified but relevant

Potential advice and funding issues

- Based on information given, Adam appears to now be out of work and unemployed. We are unaware of any capital or savings he may have from his previous well-paid career but you should explain that (regardless of earnings/capital) there is no legal aid for PI cases
- Adam may have private insurance to cover his activity as a professional body builder
- However, it should be noted that personal injury cases such as this are commonly funded *via* a Conditional Fee Arrangement (CFA) which is the most likely form of funding the case - explain how a CFA would work
- Explain to Adam that there are a number of alternative means of obtaining advice for his case such as Law Centres, Free Representation Units and Citizen's Advice

Alternate Dispute Resolution versus the appropriate civil court for Adam's case:

The alternative use of Alternative Dispute Resolution (ADR)

- Even though Solar Bodyz sounds somewhat unprofessional it is highly likely that they have public liability insurance as this is a legal requirement. They may well have separate commercial insurance to cover the tanning machines or third-party insurance that they could rely on. Therefore, it seems worthwhile for Adam to pursue his case as the funds to pay any damages would appear to be available
- Explain the reasons why Adam should not worry about going to court by explaining the benefits of a civil court adjudication
- Explain the alternative types of ADR available to Adam and discuss their relative advantages and disadvantages compared to formal action
- Suggest that in his circumstances formal mediation might be the best alternative

Likely court

- Given the amount of money involved in Adam's case (the facts in Part B estimate lost earnings at £100,000 alone), as well as the complexity of calculating the various aspects of different damages for loss of a promising professional body-building career and developing a limiting psychological condition, it is clear that this case would be heard in the High Court
- Explain to Adam that this is a court based in London but it does have regional centres so he will not have to worry about access and travel given his fear of being seen outdoors
- Explain that he will benefit from the expertise of a High Court judge given the complexity/issues in his case

Likely track

- Explain to Adam that based on the value of his claim (>£50,000), the complexity of the evidence and the complexity of assessing and awarding relevant damages, the case is almost certain to be allocated to the Multi-Track
- Explain that this is a thorough process controlled by the judges throughout. However, you should explain to Adam that the judges will also try to encourage an out- of- court settlement - quite possibly by suggesting the use of a contingency fee arrangement (CFA) or Alternative Dispute Resolution (ADR)
- Explain that if an out of court settlement cannot be made, then the trial is likely to take six months or more to come to court with many tightly prescribed pre-trial processes (PI cases have to follow pre-action

protocols) and that the trial itself will be a significant process, including use of expert medical witnesses

Likely overall outcome

Based on the law and evidence reviewed, Adam will:

- Succeed and receive significant damages
- His case will be heard on the Multi Track in the High Court
- He will not receive legal aid for a personal injury case but has a very attractive case for a CFA
- An out-of-court settlement is also quite possible but Adam should take professional advice about whether this is appropriate/enough
- ADR could be considered but, given the likely level of damages, it is submitted that these would lack the authority of a court-based outcome and award

Credit any other alternative lines of reasoning.

Ofqual

Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Rewarding Learning

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